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Supreme Court, U. S.
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in the

Supreme Court

of the

United States

October Term, 1973

No. 73-648

MADELINE WOLFE,

Petitioner

vs.

METROPOLITAN DADE COUNTY

and

ASHTON TYLER,

Respondent.

MEMORANDUM OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS, THIRD DISTRICT STATE OF FLORIDA

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MIAMI REVIEW — 371-4853 — 377-3721

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MEMORANDUM OPPOSING CERTIORARI

Respondent Metropolitan Dade County, et al., represents to the Court as follows:

1. The opinion sought to be reviewed was rendered and filed on February 27, 1973 by the District Court of Appeal of Florida, Third District (Petitioner's App. 5). On April 4, 1973, the District Court of Appeal denied rehearing (Petitioner's App. 8).

2. Petitioner seeks this Court's jurisdiction under the auspices of 28 U.S.C.A., Section 1257 (3) but did not file a petition until 192 days after the decision sought to be reviewed was rendered by the highest court of the State of Florida in which a decision could be had.

3. The Supreme Court of Florida, in which Petitioner sought jurisdiction, did *not* decline to exercise discretionary jurisdiction, but rather held it did *not* have jurisdiction[1] (Petitioner's App. 9). See also *Armstrong v. City of Tampa*, Fla. 1958, 196 So.2d 407.

4. Under Florida law, the District Court of Appeal became the highest court from which decision could be had. *Williams v. Florida*, Fla. 1970, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446, 449, note 5; See also *Ansin v. Thurston*, Fla.1958, 101 So.2d 808, 810.

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[1]A copy of Appellees' suggestion of lack of jurisdiction, filed in the Supreme Court of Florida, is attached as an Appendix hereto. It was grounded *solely* upon the Court's obvious lack of jurisdiction.

5. The petition was filed on October 13, 1973, more than 90 days since the opinion was rendered and rehearing denied, and the period for applying for a Writ of Certiorari has not been extended by a Justice of this Court (28 U.S.C.A., Section 2101 (c) and Rule 22 of this Court).

Therefore, it appears that Petitioner's application for a Writ of Certiorari is out of time and should be denied.

Respectfully submitted,

STUART SIMON
Dade County Attorney
1626 Dade County Courthouse
Miami, Florida

By ALAN T. DIMOND

Alan T. Diamond
Assistant County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Florida and the Court of Appeals, Third District, State of Florida was furnished by mail this 15 day of November, to: Robert M. Brake, Esquire, 1830 Ponce de Leon Blvd., Coral Gables, Florida.

ALAN T. DIMOND

Assistant County Attorney

APPENDIX

APPENDIX

[TITLE OMITTED]

APPELLEES' SUGGESTION OF LACK OF JURISDICTION

Appellee, Metropolitan Dade County, files this its Suggestion of Lack of Jurisdiction and says:

The Florida Appellate Rules, Rule 4.5 (c) (6) provides, in pertinent part, as follows:

> "(6) From District Court to Supreme Court. Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision."

The instant appeal comes from the District Court of Appeal, Third District. Appellant's brief raises but one jurisdictional basis: that the Court of Appeals construed controlling provisions of the Florida and United States Constitutions. The appeal does not affect, we submit, a class of constitutional officers; the appeal cites no question certified; and the appeal cites no case in conflict with the decision of the District Court.

The Appellant's brief argues only an improper application of the equal protection and due process cases. These points were considered initially in the Circuit Court and

reconsidered by the District Court of Appeals. Rule 2.1 (b) (5) provides, in pertinent part, as follows:

> "(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law." (emphasis added)

Appellee respectfully suggests that the record in this case fails to support Supreme Court jurisdiction.

First, it is well established that the Constitution's due process and equal protection clauses are always applied, but rarely construed. Here there is a simple application of the Constitution rather than a construction of those clauses. In the Armstrong v. City of Tampa case (Fla., 1958) 106 So.2d 407, the court differentiated between the verbs "to construe" and "to apply" when it defined the former as to "explain, define or otherwise eliminate existing doubts arising from the language or terms of the Constitutional provision". As the court said, at 409:

> "We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution." (emphasis added)

That the court applied a recognized clear-cut provision of the Constitution to the facts of this case is clear. The court held further that:

> "To convey jurisdiction to this court by direct appeal it is necessary that the trial judge actually construe or interpret a section of the Constitution and then apply his construction to the factual situation presented to him." (at page 410)

The gravamen of the District Court's decision is as follows:

> "The trial court was of the view that fixing of such a weight regulation, as a condition of employment, was a discrimination against a person in violation of 42 U.S.C. §1983. We cannot agree. The regulation relating to weight or overweight, like other health requirements, may properly be made a condition of employment, since there is reasonable basis to conclude that one who is obese or overweight, as for other health conditions, is

thereby more likely to become disabled during employment, to the detriment of the county financially and otherwise. As such, the regulation can be said to be grounded on business necessity. See Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158, 164; Rowe v. General Motors Corporation, 5 Cir. 1972, 457 F.2d 348, 354." Metropolitan Dade County v. Wolf, (Fla.App. 1973, 274 So.2d 584)

There is clearly no construction of the applicable constitutional clauses by the District Court. There is an application of the equal protection and due process clauses. Thus, the Armstrong case, supra, holds that the Supreme Court lacks jurisdiction unless there is construction of a controlling provision.

Second, even assuming arguendo a construction of the applicable clauses by the District Court, we submit, there is not an initial construction of a controlling provision of the Florida or federal Constitution. The Circuit Court first (initially) passed directly upon the issue. Then the Court of Appeals reversed, thus passing for the second time on the issue.

This Court held in Callendar v. State, (Fla. 1966) 188 So.2d 529 that:

> ". . . insofar as appellate review of decisions of the several district courts of appeal is concerned we have authority to entertain an appeal of a decision of one of those courts only if the decision either (1) initially (for the first time in the cause) passed directly upon the validity of a state or federal statute, or (2) construed a

controlling provision of either the state or federal constitution. For meaning of "construing" a constitutional provision as used in our constitution see Armstrong v. City of Tampa, Fla. 1958, 106 So.2d 407. We have consistently interpreted our constitution to deny this Court authority to entertain an appeal from an order of a district court unless such order either passed upon the validity of a statute or construed a constitutional provision. Evans v. Carroll, Fla. 1958, 104 So.2d 375; State ex rel. Emanuel v. Cooper, Fla. 1963, 152 So.2d 471." (emphasis added)

This could be the third consideration of the same issue.

We are aware that this Court may treat appeals improvidently brought as petitions for certiorari. However, since this decision neither affects a class of state officers nor conflicts on the same point of law with a previous decision of this Court or of another Court of Appeal, it does not fall within this Court's certiorari jurisdiction.

We submit and suggest respectfully that this appeal should be dismissed for lack of appellate jurisdiction.

STUART SIMON
Dade County Attorney
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Miami, Florida 33130

By: _____
Alan T. Dimond
Assistant County Attorney

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ERRATA

Page Four, Paragraph One,
Lines Nine to Eleven, should read,

"could be reviewed by Certiorari
or Appeal treated as Certiorari,"

Respectfully submitted,

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Coral Gables, Florida